# Omega Securities Sdn Bhd v Kok Fook Loy

HIGH COURT (KUALA LUMPUR) — SUIT NO D7–22–43 OF 2000
MARY LIM JC
25 NOVEMBER 2009

*Civil Procedure — Pleadings — Issue not pleaded — Allegation of cheating scheme and falsification of signature — Whether matters sufficiently pleaded — Rules of the High Court 1980 O 18 r 8*

*Evidence — Adverse inference — Failure to call material witness — Allegation by defendant that signature falsified — Failure to call advocate and solicitor who witnessed signature — Whether adverse inference ought to be drawn against defendant — Evidence Act 1950 s 114(g)*

*Evidence — Burden of proof — Forgery of signature — Denial of execution of document — Parties bearing burden of proof — Standard of proof on balance of probabilities*

*Securities — Margin account — Contra losses — Whether related documents conclusive proof as to amount owing — Defendant's mailing address differed from address in identity card — Whether plaintiff sufficiently proved claim*

The plaintiff claimed from the defendant monies due under a margin facility agreement granted by the plaintiff to the defendant. With this facility, the defendant was able to purchase and sell stocks, shares, debentures and warrants through the Kuala Lumpur Stock Exchange. The facility was utilised and trading was conducted through the account opened. A total indebtedness of RM39,253,565.53 arose under the account together with interest and roll-over fees. In defence to the plaintiff's action to recover the indebtedness, the defendant denied, inter alia, opening the account, giving instructions to trade, that the signature on the relevant forms were his, and that the address on the relevant forms were his. The plaintiff raised a preliminary point that because the defence was one of forgery or fraud, details of such forgery or fraud must be pleaded. The plaintiff claimed that the defendant had failed to plead these issues.

**Held**, allowing the plaintiff's claim with costs:

(1) The defence had pleaded sufficient material particulars as required

A under O 18 r 8 of the Rules of the High Court 1980. The defendant had pleaded that he was a victim of a cheating scheme and that his signatures were falsified. There were some particulars of these matters though not full. Nevertheless, the plaintiff was able to respond to these matters and file a reply. The plaintiff never sought any further
B particulars on this plea nor was it hindered in responding to the plea (see paras 4–5).

(2) The plea here was of falsified signatures. Falsification is not fraud but akin to forgery and the test in *Yong Tim v Hoo Kok Chong* [2005] 3 CLJ
C 229 applied. The defendant bore the burden of proving on a balance of probabilities that the signatures were falsified or forged. In relation to the cheating scheme, that undoubtedly was on a balance of probabilities (see para 8).

D (3) The questioned signatures were compared and analysed by two handwriting experts respectively called by the parties. Both experts arrived at diametrically opposite conclusions. However, the opinion of the plaintiff's expert (PW3) was to be preferred because he was calm, clear-reasoned and consistent. PW3 held steadfast to his opinion and
E conclusions despite the extensive cross-examination. Each answer given was supported by careful and logical methodology and reasoning. In comparison, the defendant's expert (DW2) was short on explanations for his findings and conclusions (see paras 10 & 18).

F (4) When comparing signatures there must be taken into account natural variations that occur within any set of signatures. The comparison of signatures is also not an exercise of 'spot the difference' but a holistic examination of all the characteristics in order to determine authorship, forgery etc. The signatures were not forged or falsified (see paras
G 19–20).

(5) The margin facility agreement and the power of attorney also contained the signatures of one Wong Siew Eng, an advocate and solicitor who had purportedly witnessed the defendant's signature. Yet, Wong Siew
H Eng was not called to testify. No explanation was offered to account for such failure. As such, this was an appropriate situation where an adverse inference under s 114(g) of the Evidence Act 1950 could be drawn against the defendant because the burden rested with the defendant to prove the falsity of the signatures (see para 23).

I (6) The plaintiff had proved that the account was opened by the defendant. All trading was conducted in the defendant's name following and adhering to the procedure and practice normally adopted in such margin trading. By virtue of cll 13 and 20 of the individual account application form and the margin facility agreement respectively, the

statements, records, notes and/or documents issued by the plaintiff were conclusive as to the defendant's indebtedness (see para 25).

(7) Although the address used may not be the defendant's as it differed from the address in his identification card that alone did not mean that the address was not used by the defendant. The address appeared on the application form and the plaintiff was merely adhering to the defendant's instructions in sending the notes and statements to that address (see para 27).

**[Bahasa Malaysia summary**

Plaintif menuntut daripada defendan wang terakru menerusi perjanjian kemudahan margin yang telah diberikan oleh plaintif kepada defendan. Dengan kemudahan ini, defendan boleh membeli dan menjual stok, saham, debentur dan waran di Bursa Saham Kuala Lumpur. Kemudahan tersebut digunakan dan dagangan dilakukan menerusi akaun terbuka. Keberhutangan sebanyak RM39,253,565.53 berlaku di bawah akaun tersebut bersama faedah dan yuran bergulung matang. Dalam pembelaan terhadap tindakan plaintif mendapatkan hutang tersebut, defendan menafikan, antara lain, membuka akaun tersebut, memberi arahan untuk urus niaga, bahawa tandatangan dalam borang-borang relevan adalah tandatangannya dan bahawa alamat dalam borang-borang relevan adalah alamatnya. Plaintif membangkitkan butiran awalan bahawa disebabkan pembelaan adalah rekapalsu atau *fraud*, butiran rekapalsu atau *fraud* tersebut mesti diplidkan. Plaintif mendakwa bahawa defendan gagal memplidkan isu-isu ini.

**Diputuskan**, membenarkan tuntutan plaintif dengan kos:

(1) Pembelaan telah memplidkan butiran material yang mencukupi seperti yang dikehendaki oleh A 18 k 8 Kaedah-Kaedah Mahkamah Tinggi 1980. Defendan telah memplidkan bahawa dia merupakan mangsa skim penipuan dan tandatangannya dipalsukan. Ada beberapa butiran mengenai perkara ini walaupun tidak lengkap. Plaintif tidak pernah memohon butiran lanjut atas pli ini ataupun dihalang daripada membalas pli tersebut (lihat perenggan 4–5).

(2) Pli di sini ialah tandatangan yang dipalsukan. Pemalsuan tersebut bukanlah fraud tetapi serupa dengan rekapalsu dan ujian dalam kes *Yong Tim v Hoo Kok Chong* [2005] 3 CLJ 229 terpakai. Defendan menggalas beban membuktikan atas imbangan kebarangkalian bahawa tandatangan-tandatangan tersebut dipalsukan atau direkapalsu. Berkenaan skim penipuan, beban pembuktian tentunya atas imbangan kebarangkalian (lihat perenggan 8).

(3) Tandatangan-tandatangan yang dipersoalkan dibandingkan dan dianalisa oleh dua pakar tulisan tangan yang masing-masing dipanggil oleh pihak-pihak. Kedua-dua pakar mencapai keputusan yang

A bertentangan. Tetapi, pendapat pakar plaintif (PW3) lebih diterima sebab beliau tenang, logik dan konsisten. PW3 tegas dengan pendapat dan kesimpulannya walaupun disoal balas dengan terperinci. Setiap jawapan disokong oleh metodologi dan pertimbangan yang berhati-hati dan logik. Dalam perbandingan, pakar defendan (DW2) menjelaskan
B dengan ringkas tentang keputusan dan penemuannya (lihat perenggan 10 & 18).

(4) Apabila membandingkan tandatangan-tandatangan, harus diambilkira variasi semulajadi yang berlaku dalam mana-mana set
C tandatangan-tandatangan. Perbandingan tandatangan-tandatangan juga bukanlah melakukan 'spot the difference' tetapi pemeriksaan secara menyeluruh kesemua karektor untuk menentukan penulisan, pemalsuan, dan sebagainya. Tandatangan-tandatangan tersebut tidak direkapalsu atau dipalsukan (lihat perenggan 19–20).

D (5) Dalam perjanjian kemudahan margin dan kuasa wakil juga terdapat tandatangan-tandatangan Wong Siew Eng, seorang peguambela dan peguamcara yang dikatakan menyaksikan tandatangan defendan. Tetapi, Wong Siew Eng tidak dipanggil untuk memberi keterangan. Tiada penjelasan diberikan untuk perkara tersebut. Maka, ini adalah
E situasi yang sesuai di mana inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 boleh dibuat terhadap defendan kerana beban terletak pada defendan untuk membuktikan kepalsuan tandatangan-tandatangan tersebut (lihat perenggan 23).

F (6) Plaintif telah membuktikan bahawa akaun tersebut telah dibuka oleh defendan. Kesemua urus niaga dijalankan di bawah nama defendan, mengikut dan mematuhi prosedur dan amalan yang biasanya terpakai dalam urus niaga margin tersebut. Menurut klausa 13 dan 20 Borang Permohonan Akaun Individu dan perjanjian kemudahan margin,
G penyata-penyata, rekod-rekod, nota-nota dan/atau dokumen-dokumen yang dikeluarkan oleh plaintif adalah kukuh berkenaan keberhutangan defendan (lihat perenggan 25).

(7) Walaupun alamat yang digunakan mungkin bukan merupakan alamat defendan kerana berbeza dengan alamat dalam kad pengenalannya, itu
H tidak bermakna bahawa alamat tersebut tidak digunakan oleh defendan. Alamat tersebut tertera dalam borang permohonan dan plaintif hanya menurut arahan defendan agar menghantar nota-nota dan penyata-penyata ke alamat tersebut (lihat perenggan 27).]

I **Notes**

For a case on margin account in general, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) para 913.

For cases on failure to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 185–201.

For cases on forgery of signature, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 518–528.
For cases on handwriting, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1592–1601.
For cases on issue not pleaded, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5447–5451.

**Cases referred to**

*Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133, FC (refd)
*Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 CLJ 1, FC (refd)
*Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
*Chan Yoke Lan (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303, CA (refd)
*Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61, FC (refd)
*EON Bank Bhd v Hotel Flamingo and another case* [2005] 1 MLJ 712, HC (refd)
*Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868; [2008] 1 AMR 10, CA (refd)
*Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd* Civil Appeal No M-02–223 of 2007; [2009] MLJU 243 (refd)
*Hadmor Productions Ltd & Ors v Hamilton & Anor* [1983] 1 AC 191, HL (refd)
*Lee Kim Luang v Lee Shiah Yee* [1988] 1 MLJ 193; [1988] 1 CLJ (Rep) 717, HC (refd)
*Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416; [1989] 1 CLJ (Rep) 116, SC (refd)
*Murarilal v State of MP* AIR 1980 SC 531 (refd)
*Ng Ah Ba & Ors v Ramanda Sdn Bhd* [1996] 1 MLJ 62; [1996] 1 CLJ 738, CA (refd)
*Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd and other appeals* [2008] 5 MLJ 128; [2008] 3 CLJ 692, CA (refd)
*Saminathan v Pappa* [1981] 1 MLJ 121; [1980] 1 LNS 174, PC (refd)
*See Hua Daily News Sdn Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107, SC (refd)
*United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182; [1993] 2 CLJ 31, SC (refd)
*Wallinford v Mutual Society* (1880) 5 App Cas 685 (refd)
*Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330, SC (refd)
*YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621; [1997] 4 CLJ 300, CA (refd)

A *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229, FC (folld)
*Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85, CA (distd)

**Legislation referred to**

B Criminal Procedure Code s 399
Evidence Act 1950 ss 51, 114(g)
Rules of the High Court 1980 O 18 r 8

*Bahari Yeow (Lee Hishamuddin Allen & Gledhill) for the plaintiff.*
C *TT Ng (Tang & Lee) for the defendant.*

**Mary Lim JC:**

BRIEF FACTS

D

**[1]** This is a claim for monies due under a margin facility agreement granted by the plaintiff to the defendant on 17 November 1997. The limit afforded to the defendant was RM60m. With this facility, the defendant was
E able to purchase and sell stocks, shares, debentures and warrants through the Kuala Lumpur Stock Exchange (Bursa Malaysia) subject to the terms and conditions in the agreement. The facility was utilised and trading was conducted through the account opened. The defendant failed to repay the amount due and the plaintiff sued. As at 5 June 1998, the total indebtedness
F of the defendant is RM39,253,565.53 together with interest and roll over fees of RM17,257,871.09. Default judgment was initially entered against the defendant. The defendant learnt about this default judgment through CTOS which recorded bankruptcy proceedings as pending against him. Subsequently, the default judgment was set aside and after close of pleadings,
G the matter finally came up for hearing on 15 April 2009. In the intervening period before this matter came up for trial, the plaintiff company was wound up on 11 March 1999 and provisional liquidators were appointed.

H **[2]** The principal, if not the only defence of the defendant is one of denial — denial of the opening of the account, denial of instructions to trade; denial that the signature on the relevant forms are his and denial that the address on the relevant forms are his address. At para 4 of the defence, it is pleaded that 'Defendan adalah mangsa skim penipuan di mana nama, maklumat dan
I tandatangannya telah dipalsui dan disalahgunakan oleh pihak-pihak tertentu. Segala atau apa-apa tandatangan defendan yang terdapat pada mana-mana dokumen dalam milikan plaintif berkenaan perjanjian mahupun tawaran tersebut adalah palsu. Defendan tidak pernah menggunakan kemudahan perjanjian tersebut dan atas alasan itu defendan tidak langsung sama sekali

terhutang kepada plaintif'. A

PRELIMINARY ISSUE

**[3]** Before dealing with this defence, I need to first dispose a preliminary point raised by the plaintiff. The plaintiff takes the position that because the defence is one of forgery or fraud, details of such forgery or fraud must be pleaded — see *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85. Because of the failure to plead, this plea must be disregarded. I have carefully considered this point and have found that the defence is as I have said earlier, one of denial and details or reasons for such denial are offered. Essentially, the defendant has pleaded that the signatures in the relevant documents are not his and, that his signature has been falsified. The facts in *Yoong Sze Fatt* are quite distinguishable from the facts here. In that case, the opening of the account was admitted. The dispute was over the utilisation or authorisation of trading of the account. The court rejected the issue of the allegation of forgery as it was not even pleaded but merely put to the plaintiff's witness. This is quite different from the present case where the issue and facts have been pleaded. Apart from para 4 of the defence alluded to earlier the defendant alleged he is a victim of a 'skim penipuan' or cheating scheme. B C D E

**[4]** I am of the view that paras 4 and 6 of the defence have pleaded sufficient material particulars as required under O 18 r 8 of the Rules of the High Court 1980. That rule requires the defendant to plead specifically and matter or any fact showing illegality which makes the claim not maintainable; if not pleaded might take the plaintiff by surprise; or raises a fact not arising out of the claim. Fraud and forgery are but examples of specific pleas. It was contended that the plea filed was insufficient to sustain the defence raised. Relying on *Lee Kim Luang v Lee Shiah Yee* [1988] 1 MLJ 193; [1988] 1 CLJ (Rep) 717 where KC Vohrah J (as His Lordship then was) held, following *Wallinford v Mutual Society* (1880) 5 App Cas that '… A general allegation of fraud is insufficient even to amount to an averment of fraud of which any court ought to take notice', Mr Bahari Yeow, learned counsel for the plaintiff took the view that the pleadings on forgery did not provide the particulars required for the plea to be a good plea. In which case, as was held in *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330 by the Supreme Court reiterating a stand already taken in its earlier decision in *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416; [1989] 1 CLJ (Rep) 116 at p 233 on the importance of pleadings where the Supreme Court quoted with approval the opinion expressed by Lord Diplock in *Hadmor Productions Ltd & Ors v Hamilton & Anor* [1983] 1 AC 191 on why such matters needed to be specifically pleaded: F G H I

> Under our adversarial system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …

**[5]** The principle is said to have greater force in cases where fraud or conspiracy is alleged — *Ng Ah Ba & Ors v Ramanda Sdn Bhd* [1996] 1 MLJ 62; [1996] 1 CLJ 738 where the Court of Appeal relied on the Supreme Court decision in *Hua Daily News Sdn Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107 which found that the failure to condescend upon particulars of fraud was fatal. It was similarly held by the Court of Appeal in *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621; [1997] 4 CLJ 300 that an allegation of conspiracy has to be specifically pleaded and full particulars rendered before evidence can be led on it. In the facts of this case, the defendant has pleaded that he was a victim of a cheating scheme and that his signatures were falsified. There are some particulars of these matters though not full. Nevertheless, the plaintiff was able to respond to these matters and file a reply. Specifically, at para 3 of the reply and defence to counter claim, the plaintiff averred that the allegations of the defence are allegations which are bare, doubtful, inaccurate and inconsistent with existing documents. The plaintiff never sought any further particulars on this plea nor was it hindered in responding to the plea. In the matter of falsification of signatures, I may add that all that is required is pleaded. Whether the defendant succeeds in leading cogent evidence to prove that plea is entirely a different consideration. That however cannot be reason to dismiss the plea at this outset. I therefore find the matters of falsification of signatures and cheating scheme have been specifically and properly pleaded. I do not find the defendant attempting to raise through evidence or submission an issue, a fact or a defence that departs from the pleaded case.

BURDEN OF PROOF

**[6]** With this specific plea, the burden of proof lies with the defendant — *Yoong Sze Fatt*, *EON Bank Bhd v Hotel Flamingo & another case* [2005] 1 MLJ 712. It is for the defendant to lead evidence to conclusively prove that the signatures in the relevant documents are falsified signatures and that there was a cheating scheme where he was a victim.

**[7]** Related to this is the issue of the standard of proof, whether the defendant is required to prove its case on a balance of probabilities or beyond reasonable doubt. It is the plaintiff's submission that the standard is one that is beyond reasonable doubt. In *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229, the Federal Court had occasion to examine whether the standard of

proving on a balance of probabilities for cases of forgery as decided in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133 applied in cases of fraud. The Federal Court declined to follow that standard preferring instead to adhere to the test long applied since the decision in *Saminathan v Pappa* [1981] 1 MLJ 121; [1980] 1 LNS 174. In the Federal Court's view the correct test or standard of proof for cases of fraud in civil proceedings is proof beyond reasonable doubt. This decision was recently applied by the Court of Appeal in *Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd and other appeals* [2008] 5 MLJ 128; [2008] 3 CLJ 692, *Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd* Civil Appeal No M-02–223 of 2007 and *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 CLJ 1.

**[8]** However, the plea here is not of fraud but falsified signatures. Falsification is not fraud but akin to forgery and the test in *Yong Tim* applies. The defendant bears the burden of proving on a balance of probabilities that the signatures are falsified or forged. In relation to the cheating scheme, that undoubtedly is on a balance of probabilities.

ARE THE SIGNATURES FALSIFIED OR FORGED

**[9]** From this, it can be seen that the issue critical for determination is whether the signatures appearing in the relevant documents are the defendant's or are such signatures falsified to appear like the defendant's signatures. The relevant documents are the individual account application form; the letter of authorisation; margin facility agreement; the power of attorney; and the letter of offer dated 17 November 1997. Much of the trial and thereby the submissions of both counsel focused on this issue.

**[10]** The signatures on all five documents are collectively referred to as the 'questioned signatures'. Save for the signature in the letter of authorisation, the questioned signatures have been compared and analysed against samples of the defendant's standard signatures by two handwriting experts respectively called by the parties. Both experts arrived at diametrically opposite conclusions. Mr Wong Kong Yong (DW2), the expert called by the defendant concluded that the signatures were 'hasil penulisan oleh orang berlainan' whereas Mr Harcharan Singh Tara (PW3) testified for the plaintiff and concluded that the signatures 'have 'common' authorship'.

**[11]** The problem with handwriting experts has been well discussed in *Yoong Sze Fatt*. The difficulties presented by handwritings are largely due to the fact that the expertise under scrutiny is more of subjective evaluations and

not a matter of exact science. Hence, it has been said that even lay persons may give admissible evidence of opinions on this. This is in conformity with s 51 of the Evidence Act 1950.

**[12]** In *Yoong Sze Fatt* at para 24, the Court of Appeal cited *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61 where Anuar CJ Malaya discussed the 'hazard' in accepting the opinions of handwriting experts. At p 85 His Lordship referred to the Supreme Court of India's decision in *Murarilal v State of MP* AIR 1980 SC 531 at p 534 where this same issue was discussed:

> But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses — the equality of credibility or incredibility being one which an expert shares with all other witnesses — but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger prints has attained near perfection and the risk of an incorrect opinion is practically non existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher.

**[13]** The Court of Appeal also cited an article entitled 'Sources of Error in Forensic Handwriting Evaluation' reported in the *Journal of Forensic Sciences*, Vol 40, No 1 January 1995 at p 78 which discussed the same concerns about handwriting expertise:

> Handwriting examination is generally considered, by friends and critics alike, to be more subjective than the other crime laboratory specialties in that it relies more on experienced judgment than on quantifiable date. If we accept this premise, it would follow that it should be all the more important to adhere to agreed on principles so as to preserve the greatest degree of objectivity and, thereby, accuracy.
>
> Three particular problem areas seem to cause most of the errors in handwriting cases, whether they involve signatures, handwritten texts, or handprinting. They are (1) failure to properly evaluate differences; (2) failure to detect significant movement characteristics; and (3) the use of self-serving exemplars.

**[14]** With such caution and being aware of the problems presented in such evidence, the court has a duty to satisfy itself that the 'expert' is indeed the expert that he represents himself to be. The expert has to be '… specially qualified, armed with the necessary skill and experience and has a vast knowledge in the field or enquiry carried out by him. The court would also want to know the duration of time the '*expert*' has engaged himself in his field of expertise and whether that is his only occupation and in which court he

has testified. Generally, the court is interested to know the expert's background. The purpose is simply to show the competency of the expert. It is for these reasons that the expert will be asked about his general and technical education together with the special studies which he may have undertaken …'. In short, the '*expert*' must be a qualified person.

**[15]** I find both experts called by both parties competent and experienced. But, in determining whose expertise is to be preferred, if at all, the number of times one expert witness has attended court offering expert opinion on handwriting is by no means the sole determinant. What counts is the quality of the evidence given and how such evidence was treated by the court. On occasion the evaluation by the expert's own peers may also be insightful. In the case of these two experts, both have attended and obtained appropriate training towards gaining expertise in handwriting examination and analysis. Both have also written articles on their expertise though PW3 has written or presented more at the international level. The articles that he has written locally have been published in the *Malayan Law Journal* and have been referred to by the Court of Appeal in *Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868; [2008] 1 AMR 10 and by the High Court in *EON Bank Bhd v Hotel Flamingo and another case* [2005] 1 MLJ 712. Having heard and observed them testify, I am able to form my own opinion as to the quality of their evaluations on the signatures in the relevant documents and draw on my own conclusions on the signatures under challenge. This is particularly necessary since the two experts differ in their conclusions.

**[16]** In the case of DW2, he testified on his report prepared on 15 July 1999 pursuant to s 399 of the Criminal Procedure Code (Act 593). The Securities Commission had instructed him to 'examine the signatory of the questioned signatures on the documents in envelope 'C-1' with the specimen signatures of 'Kok Fook Loy' in envelope 'C'. In his report he stated that it was 'Untuk pengecaman, dokumen ditandakan …' that is he was to identify the signatures in the relevant documents. Based on his examination, he formed 'the opinion that the questioned signatures on the original questioned documents in envelope 'C-1' were not written or not originated from the writer of the specimens 'Kok Fook Loy' in envelope 'C'. However, I am unable to ascertain the authorship of the questioned signatures on the carbon and photocopy of the documents in envelope 'C-1' — *p 58 bundle B*. PW3 on the other hand concluded in his signature verification report that the questioned signatures have 'common authorship to that of the standards'.

**[17]** Having seen and considered the testimony of the experts and the documents examined by them, I find the methodology engaged by both experts is in fact substantially the same. Both experts examined the signatures under microscopes. Both experts examined the characteristics of the

defendant's handwriting. By this, features such as the sequence of strokes, structural details, number of turning points, similarity of spatial configuration, pictorial impressions, uniqueness of style or design structure, evidence of hesitation or tremor, looping, diacritic and rubric, subtle touch-ups and filling-in, slope and slant, pressure and fluency, natural variations, terminal strokes, underscores; and made comparisons of all these characteristics in both the questioned and standard or specimen signatures in order to come to their respective conclusions. In other words, these experts compared similarities and differences in handwriting characteristics between the two sets of signatures. Yet, the experts differed in their conclusions.

**[18]** In my view, the opinion of PW3 is preferred. My reasons are several. I first find PW3 a calm, clear-reasoned and consistent witness who held steadfast to his opinion and conclusions despite the extensive cross-examination. Each answer given is supported by careful and logical methodology and reasoning. Such reasoning is sound, balanced and firm and may safely be accepted by the court. In *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182; [1993] 2 CLJ 31, the Supreme Court agreed with the contention of the appellant counsel that 'the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and any reliance upon such evidence would, in our judgment, constitute a serious misdirection warranting interference by an appellate tribunal …'. In PW3's view, the differences or variations in the two sets of signatures are all differences or variations within natural variations as every signature cannot be duplicated exactly alike. According to PW3, there are bound to be variations in a person's signatures at any given time. Although PW3 does not have a proper laboratory, I do not consider this of any significance as the examination or the analysing of signatures including the signatures at issue, need not be carried out in a laboratory, let alone one that is accredited. There is further no statutory requirement for this. The process and methodology involved require use of microscopes or magnifying glasses and close study. In fact, PW3 examined the documents in the Shah Alam court premises as the documents were kept there in relation to another case. In comparison, DW2 is short on explanations for his findings and conclusions.

**[19]** I further find that PW3 observed the rule of comparing similarities as well as differences when examining handwriting as compared to DW2 who focused on the differences. As testified by PW3, when comparing signatures there must be taken into account natural variations that occur within any set of signatures. The comparison of signatures is also not an exercise of 'spot the difference' but a holistic examination of all the characteristics in order to determine authorship, forgery etc. Even in the differences spotted by DW2

which he opined were significant, PW3 has disagreed and given sound and reasonable explanations. In PW3's opinion, the differences spotted by DW2 are due to the dynamics or the speed of the writing where there is 'slurring of the writing or the strokes' due to 'behavior and speed of the writing' or the nature of the pen used, whether it is plastic tipped or fibre tipped. Such differences would however not be due to motor memory or the habitual act of writing as signatures are done without thinking as it is already in the memory of the signatory. In PW3's opinion, the signatures actually remain consistently the same especially in the structure of the letters in the signatures. And that is most critical in determining whether there is forgery and, authorship. To PW3, this proves the authorship is common.

**[20]** Of greater significance is the conclusion that I draw from the evidence of both experts. Although the experts differed on the question of common authorship, I do not find either witness testifying that the questioned signatures are forged or falsified signatures. Neither of the experts concluded that the questioned signatures are disguised or imitated. In DW2's words, the signatures were in 'free hand', 'fluent', not disavowed. In my view this can only mean that the signatures are not forged or falsified. The signatures can only be said to be genuine. Whoever signed these documents was not imitating, simulating or forging another person's signature. At para 17 of his report, PW3 stated that '… when a signature is 'copied/simulated' the 'copier/simulator' needs to reproduce its overall appearance sufficiently well to look authentic. Two conditions must be met to achieve a good 'copy/simulation' of a well formed signature: (i) accuracy in shape/structure and proportion within the signature, and (ii) smoothness or fluency of the line quality'. At para 18, PW3 said that 'Either one is not too difficult to manage; but to satisfy both is nearly impossible. One would either write slowly to achieve accuracy or write rapidly to achieve more fluency … In this case there are no structural inconsistencies there is similarity in structure and design, smoothness or fluency of the line structure is there, as well as the size proportions especially in the large and small letters … The structure is clear … they result from the same level of motor memory control and pen control. There are no signs of tremor or hesitation in the line structure. The number of strokes, turning points, slope/slant are similar and within the natural variation. A signature that does produce all the features of the genuine like orientation of the pictorial impression or spatial configuration and slope/slant, height/width ratio (size and proportion), rhythm (which is good in these questioned signatures and the standards) has common authorship. I am therefore of the opinion that 'Q1' to 'Q5' have common authorship to the standards 'S1'–'S29'. Having examined all the signatures in all the documents put before me, I agree with the conclusions of PW3. The variations found in all the signatures are natural variations or the 'imprecision or divergence with which the habits of the writer are executed on a repeated occasion'. The structure of the signatures in both sets remained consistently

A the same and the conclusion of common authorship as made by PW3 is supported by his explanations and the empirical evidence tendered.

**[21]** While this conclusion is vital, it differs from the defence pleaded which alleged that the defendant's signature had been forged or falsified. B There is not a shred of evidence before me that proves that the signatures are forged or falsified. On the contrary, as mentioned, the signatures are not forged or falsified. Saying that the writer of the questioned signatures is not the writer of the specimen signatures is not the same as saying that the signatures on the questioned signatures are false or forged. And that is what C the defence is. On this alone, the defence must fail.

**[22]** Be that as it may and since I am satisfied that the author of all the signatures is common and belonging to a person named Kok Fook Loy, it D comes to bear that the defendant who is Kok Fook Loy did enter into the margin facility agreement with the plaintiff where he then traded and utilised the facility as claimed by the plaintiff. It has not been suggested by the defendant that there is another person of the same name or that the identification card number appearing in the agreement is not his. It does not E matter why the defendant signed in the manner or the way that he did but the signatures in the questioned signatures and thereby the related documents are his. In *Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd* Civil Appeal No M-02–223 of 2007 the Court of Appeal opined the comments of this same expert witness PW3 on why a signatory would sign F differently: 'It is not uncommon for a person to deliberately modify his signature for a specific purpose, and then disclaim it at a future date to get an advantage.' This is the situation in the facts of this case. Though the signatures of the defendant are disclaimed, it has been proved on a balance of probabilities that the questioned signatures are indeed his.

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**[23]** There is another compelling reason why I must reject the defence pleaded. Amongst the several documents adduced as evidence are the margin facility agreement and the power of attorney. These documents contain not only the purported signatures of the defendant but the signature of one Wong H Siew Eng, an advocate and solicitor practising at the material time in Kuala Lumpur. This person would have been in the best position to readily confirm if the defendant indeed signed the agreements and other related documents. As set out in the documents, the signature of the defendant had to be signed in the presence of a witness and in this case, it was Wong Siew Eng. Yet, I Wong Siew Eng was not called to testify. No explanation has been offered to account for such failure. Were Wong Siew Eng to be called, it would have resolved the matter quite easily without recourse to the handwriting experts. I can only see this as an appropriate situation where an adverse inference under s 114(g) of the Evidence Act 1950 may be drawn against the defendant

— see *Chan Yoke Lan (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303. The burden rests with the defendant to prove the falsity of the signatures and it would be rather obvious if not more appropriate to call the witness to the signature to testify as to the matters pleaded by the defendant. He did not and the burden lies not discharged. For this reason too, the defence pleaded must fail.

**[24]** On the matter of the cheating scheme, insufficient evidence has been led. While there may very well be such a scheme, it has not been shown how the defendant is its victim, especially in the light of this court's view on the matter of the signatures.

THE PLAINTIFF'S CLAIM

**[25]** Insofar as the claim is concerned, the plaintiff has proved that the account was opened by the defendant. The terms and conditions in the agreement and the letter of offer are legally binding terms on both parties — *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd*. All trading was conducted in the defendant's name following and adhering to the procedure and practice normally adopted in such margin trading. The plaintiff called Lau Jiong Chean (PW1) the plaintiff's finance manager and Lim Jit Cheng (PW2) who testified on behalf of the liquidator. These witnesses testified as to the losses, purchases of the various shares, outstanding balance, interest and roll over fees, as well as the correctness of the accounts. According to these witnesses, no protests or objections had ever been raised by the defendant in relation to the contract notes sent to the defendant. The margin financing report, the client history transaction and the statement of account and the certificate of indebtedness (P3) are documents of the nature and quality as described in cll 13 and 20 referred to. This contemporaneous documentary evidence of the transactions carried out by the defendant support the oral evidence of the plaintiff's witnesses. By virtue of cll 13 and 20 of the individual account application form and the margin facility agreement respectively, the parties have agreed on the conclusiveness of the statements, records, notes and/or documents issued by the plaintiff as to the defendant's indebtedness. Such evidence is also conclusive and binding on the defendant — see *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544.

**[26]** The evidence of PW1 and PW2 were not seriously challenged and neither was the issue of the debt and how it evolved. The defendant has also not shown any error or fraud in the documents put forth by the plaintiff. In which case, as was intended by the parties by virtue of cll 13 and 20 of the individual account application form and the margin facility agreement, the

margin financing report, client history transaction, statement of account and the certificate of indebtedness conclusively bind the defendant on the level of his indebtedness to the plaintiff.

**[27]** One other issue raised by the defendant to support his contention that the agreements could not have been made by him concerned the address to which the contract notes and the statements had been sent. It is the defendant's case that the scheme to which he was a victim involved a person who used that same address that was used in relation to the defendant. While the address may not be the defendant's as it differs from the address in his identification card that alone cannot and does not mean that the address is not used by the defendant. This address appears on the application form and the plaintiff was merely adhering to the instructions of the defendant in sending the notes and statements to that address. This issue is therefore without merit.

**[28]** I therefore find the claim of the plaintiff proved on a balance of probabilities and I award the claim as prayed together with costs of RM50,000.

*Plaintiff's claim allowed with costs.*

Reported by Kanesh Sundrum